BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals

Capitol Infiniti, Inc.,

Complainant

v. Case No.: 96-H-1000

Infiniti Division,
Nissan Motor Corporation in USA,

Respondent

FINAL RULING ON MOTION FOR SUMMARY JUDGMENT

Capitol Infiniti, Inc., (Capitol or complainant) is an Infiniti motor vehicle dealer in Milwaukee, Wisconsin. The Infiniti Division of the Nissan motor Corporation USA (Infiniti or respondent) issued a Notice of Termination of the dealer sales and service agreement dated October 8, 1996, and an amended Notice of Termination on October 15, 1996. On November 6, 1996, Capitol filed a complaint of unfair termination pursuant to sec. 218.01(2)(bd)2, Stats., with the Division of Hearings and Appeals.

On December 23, 1996, Infiniti filed a motion for summary judgment seeking dismissal of the complaint. The complainant filed a response brief on January 6, 1997; and the respondent filed a reply brief on January 13, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Capitol Infiniti, Inc., by

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Infiniti Division, Nissan Motor Corporation in USA, by

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A proposed ruling on the motion for summary judgment was issued on February 4, 1997, by Mark J. Kaiser, Administrative Law Judge. The complainant filed objections to the proposed ruling on February 18, 1997, and the respondent filed comments in support of the proposed decision on February 21, 1997. The complainant objected to a statement in the proposed ruling indicating that the complainant cited no authority for its assertion that the manufacturer must give a dealer an opportunity to cure a material breach of the dealer agreement prior to issuing a notice of termination.

The phrase "just provocation" is defined at sec. 218.01(3)(a)17., Stats., as "a material breach by a motor vehicle dealer or distributor, due to matters within the dealer's or distributor's control, of a reasonable and necessary provision of an agreement and the breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer, importer or distributor." Therefore, there is a requirement that a manufacturer give a dealer an opportunity to cure a breach of the dealer agreement. Nevertheless, as discussed in the proposed decision, the respondent did give the complainant an opportunity to cure the alleged breach which was the subject of the motion for summary judgment.

No standards are set with respect to what the written notice of the breach must include or what constitutes a reasonable period of time. Under the circumstances, the notice provided by the respondent to the dealer was adequate notice and provided the dealer a reasonable amount of time to cure the breach. The proposed ruling is amended to reflect this determination, in all other respects the proposed ruling is adopted as the final ruling in this matter.

The methodology for deciding a motion for summary judgment as recently restated by the Wisconsin Supreme Court is as follows:

> The first step of the standard methodology used by a trial court when faced with a motion for summary judgment requires the court to examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment.
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> If the moving party has made a *prima facie* case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether there exists disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to trial. Voss v. City of Middleton, 162 Wis.2d 737, 470 N.W.2d 625 (1991).

The first issue, accordingly, is whether the respondent has made out "a *prima facie* case for summary judgment. The basis of the motion for summary judgment is that the complainant closed the doors of its dealership on October 5, 1996 and is no longer an active Infiniti dealer.[1] Pursuant to Section 11.A.4 of the Dealer Sales and Service Agreement, this

[1] The October 8, 1996 notice of termination also cites as a grounds for termination the suspension of the complainant's floor planning. This basis for termination is not part of the respondent's motion for summary judgment.

constitutes grounds for termination of the agreement. Section 11.A(4) of the Dealer Sales and Service Agreement executed by the complainant and the respondent provides:

> The following represent events which are within the control of or originate from actions taken by Dealer or its management or owners and which are so contrary to the intent and purpose of this Agreement that they warrant its termination:
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> . . .
>
> (4) The failure of Dealer to maintain the Dealership Facilities open for business or to conduct all the Dealership Operations required by this Agreement during and for not less than the hours customary and lawful in Dealer's Primary Market Area or in the metropolitan area in which Dealer is located for seven (7) consecutive days, unless such failure is caused by fire, flood, earthquake or other act of God;

The complainant does not dispute that the dealership has been closed since October 5, 1996, and does not allege it has any intention of reopening the dealership. The issue then becomes whether the fact that the dealership has been closed, as a matter of law, constitutes grounds for the termination of the franchise agreement.

In its response to the motion for summary judgment, the complainant primarily raises two arguments. The first argument is that the respondent did not give the complainant any opportunity to cure the default. The respondent did give the complainant an opportunity to cure the breach of the dealer agreement. In its October 8, 1996, notice of termination, the respondent warned the complainant that "[a]s of October 5, 1996 the Dealership Facilities of Capitol have been closed for business and Dealer has discontinued all normal dealership operations. Furthermore, you have advised us that you have no plans to reopen the dealership. ...[I]n the event that Capitol's facilities continue to be closed for business and Capitol continues to fail to conduct dealership operations for seven consecutive days, Infiniti will amend this notice of termination to formally include this material breach of the agreement as an additional basis for termination of the agreement." (emphasis in original). When the complainant failed to reopen this dealership, the amended notice of termination was issued.

At the time the motion for summary judgment was filed, the dealership was closed for more than sixty days.[2] It is undeniable that Capitol has breached its dealership agreement, that Capitol failed to cure the breach within a reasonable time after receiving written notice of the breach from Infiniti, and that the breach constitutes grounds for termination.

The complainant's second argument opposing the motion for summary judgment is that it was misled by the respondent. The complainant alleges that it closed its dealership

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[2] The complainant indicates that salespersons at Capitol Auto Imports, Inc., a "sister corporation" of the complainant were capable of entering into contracts for the sale of Infiniti motor vehicles and that it had made arrangements with Phil Tolkan Nissan to perform service work for Infiniti owners. The complainant does not allege that these arrangements constituted fulfillment of its dealership responsibilities and obligations. Additionally, on December 6, 1996, Capitol Auto Imports, Inc., also closed.

believing that the respondent would approve the transfer of the dealership. At the time the motion for summary judgment was filed, the respondent had not approved the proposed transfer. The complainant argues that the respondent is terminating its dealership without due regard to the equities.

The complainant is asking that its dealership not be terminated in order to give it an opportunity to transfer the dealership. If the dealership is terminated and the complainant is unable to transfer it, he alleges he will be financially damaged. Assuming the respondent did indeed mislead the complainant, the closing of the dealership would still be grounds for termination. The case would be similar to Mar-Ren, Ltd. v. Ford Motor Co., Office of Commissioner of Transportation, Docket No. H-441.

The complaint in Mar-Ren was dismissed because the Office of the Commissioner of Transportation had no remedy available to it. This is no longer the case. Secs. 218.01(3x) and 218.01(9)(a), Stats., give the Division of Hearings and Appeals authority to provide a remedy. The remedy is to find an unfair practice on the part of the respondent. This can be done without continuing the automatic stay and leaving this market area without adequate dealer representation. Pursuant to sec. 218.01(9)(a)2, Stats., a finding of a violation of sec. 218.01(3)(a)24, Stats., on the part of the respondent would serve as a basis for seeking damages from the respondent. Presumably, these damages would include any loss resulting from being unable to transfer the dealership.

In summary, the fact that the complainant has closed the dealership and does not intend to reopen it is undisputed. The closure of the dealership constitutes grounds to terminate the dealer agreement. The complainant raises issues that it was mislead by the respondent into not reopening its dealership. Factual disputes on these issues exist; however, even if misrepresentation on the part of the respondent was found, the complainant has not indicated any intention of reopening the dealership.

The complainant's intent is to transfer the dealership and it has sought approval from the respondent to do so. The complainant alleges that the respondent is attempting to terminate its franchise prior to granting approval for the sale of the dealership. This allegation is more appropriately considered within the context of a complaint filed pursuant to sec. 218.01(3x)(b)3, Stats. If as a result of a hearing on such a complaint, a finding is made that the respondent has violated sec. 218.01(3)(a)24, Stats., pursuant to sec. 218.01(9)(a)1, Stats., this finding would be a basis to recover damages from the respondent.

Conclusions of Law

The Administrator concludes:

1. The complainant's closure of its dealership on October 5, 1996, and failure to reopen the dealership since that date constitutes grounds for the cancellation of its dealer agreement with the respondent. The cancellation of the dealership agreement is not unfair, without due regard to the equities, or without just provocation

2. Pursuant to secs. 218.01(2)(bd)2, and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The motion for summary judgment filed by the respondent is granted and the complaint filed by Capitol Infiniti, Inc., is dismissed.

Dated at Madison, Wisconsin on March 6, 1997.

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By: David H. Schwarz
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